

**United Food and Commercial Workers Union Local  
1439 and Lep-Re-Kon Marts, Inc. Case 19-CB-  
4253**

31 July 1984

**DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER**

Upon a charge duly filed by the Employer, the General Counsel of the National Labor Relations Board by the Regional Director for Region 19 issued a complaint and notice of hearing dated 30 October 1981 and an amendment to the complaint dated 5 May 1982 against United Food and Commercial Workers Union Local 1439, the Respondent. The complaint as amended alleges that the Respondent had engaged in certain unfair labor practices within the meaning of Section 8(b)(3) of the National Labor Relations Act.

On or about 15 June 1982 the parties entered into a stipulation of facts and jointly petitioned the Board to transfer this proceeding directly to itself for findings of fact, conclusions of law, and the issuance of a decision and order. The parties stipulated that they waived a hearing before an administrative law judge, the making of findings of fact and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision and recommended order. The parties also agreed that the charge, complaint and notice of hearing, amendment to the complaint, answers, and stipulation of facts and the exhibits attached thereto and made a part thereof constitute the entire record in this case and that no oral testimony was necessary or desired by the parties.

On 23 September 1982 the Board issued its order approving the stipulation and transferring the proceeding to the Board. Thereafter the Respondent and the General Counsel filed briefs in support of their respective positions.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the stipulation, the briefs and the entire record in this proceeding, and makes the following

<sup>1</sup> We deny the General Counsel's motion to strike the Respondent's brief because of late receipt by the Board. The brief, although forwarded by certified mail 3 days in advance of its due date, was actually received a day late. Under the circumstances, we deem the brief to have been timely submitted.

**FINDINGS OF FACT**

**I. THE BUSINESS OF THE EMPLOYER**

Lep-Re-Kon Marts, Inc., the Charging Party, is a Washington corporation with facilities in Richland and Pasco, Washington, and is engaged in the business of retail sale of food and sundry items. The Charging Party in the course and conduct of its business operations received gross revenues in excess of \$500,000 from the sale of goods and services and caused to be transferred and delivered to its facilities within the State of Washington goods and materials valued at in excess of \$50,000 directly from sources outside the State or from suppliers within the State which in turn obtained goods and materials directly from sources outside the State. The parties stipulated, and we find, that the Charging Party is now, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

The parties stipulated, and we find, that the Respondent, United Food and Commercial Workers Union Local 1439, is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. Facts**

Since 12 December 1979 the Respondent has been the exclusive collective-bargaining representative of the employees in the following unit:

All employees employed by the [Charging Party] at its Richland and Pasco, Washington retail grocery facilities, excluding meat department employees, office clerical employees, guards and supervisors within the meaning of the Act.

The Respondent and the Charging Party were parties to an agreement effective by its terms from 12 December 1979 to 26 October 1981.<sup>2</sup>

On 27 August the Charging Party requested the Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of the employees in the unit. By letter dated 4 September, Gary Lofland, the Charging Party's attorney, wrote the Respondent's president, Sean Harrington, requesting information for new contract negotiation purposes including, inter alia, financial reports

<sup>2</sup> All dates are in 1981 unless otherwise noted.

for the health and pension plans for 1978, 1979, and 1980; names of employees who have vested pensions; and a list of names and pension credits of other employees.<sup>3</sup>

Harrington was a trustee of the funds for which the Charging Party requested information. As a trustee Harrington was provided with information by the administrator at each trustee meeting which outlined the trust's financial condition, including financial reports. Nevertheless, on 17 September Harrington responded to Lofland's letter by stating that all pertinent information requested could be obtained by directly contacting the administrator of the three funds.<sup>4</sup> The letter also included copies of the current plans of the funds. Harrington did not relay the Charging Party's request to the funds or to other trustees. However, the Respondent's attorney, Fred Schuchart, requested the information Lofland desired from the Retail Clerks Health and Welfare Trust and was informed that although such request was novel it would be considered at the next trustee meeting in November.

Two months later, by letter dated 19 November, Lofland wrote Schuchart and requested the same information he had requested from the Respondent in his 4 September letter. Lofland also wrote on this date to United Administrators, Inc. for the information pertaining to the funds they administered on behalf of the Respondent. By letter dated 23 November Schuchart informed Lofland that Schuchart had no authority to bargain on behalf of the Respondent with regard to this bargaining unit and that Lofland should contact the Respondent's negotiators. Meanwhile an employee of the Retail Clerks Health and Welfare Trust mailed to Lofland a copy of that fund's annual report for the fiscal year ending 30 April 1980. The annual report identified the administrator's address and telephone number and advised Lofland that additional information could be obtained by contacting the administrator who may charge a fee for preparing the information.

By letter dated 8 December, United Administrators, Inc. provided Lofland with certain of the information requested for the Retail Clerks Pension Trust. The letter identified the unfunded vested liability for the fund for the plan years ending 30 September 1979 and 30 September 1980. Lofland was also advised that if he wanted a calculation of the Employer's withdrawal liability there would be

a charge of \$40 and that Lofland could contact the administrator for further questions. On 10 December United Administrators, Inc. advised Lofland by letter that the Washington Meat Industry Pension Trust had no unfunded liability for vested benefits for the plan year ending 30 June 1980 and that the administrator was currently preparing a study for the plan year ending 30 June 1981.

### B. Contentions of the Parties

The General Counsel contends that the Respondent violated Section 8(b)(3) of the Act by refusing to furnish the Charging Party with certain trust and pension information during negotiations for a new collective-bargaining agreement. Citing *Hospital Employees (Sinai Hospital)*, 248 NLRB 631 (1980), the General Counsel contends that when an employer requests fund information from a union that has representatives who are trustees of that fund the union has the minimum affirmative obligation to make a reasonable effort to obtain the information or to investigate reasonable alternative means for obtaining same or to truthfully explain or document the reasons for its unavailability. The General Counsel further contends that since Harrington was a trustee and did not meet this obligation the Respondent violated the Act.

The Respondent contends that the instant situation is different from *Sinai Hospital* because, inter alia, Harrington responded to the Charging Party's requests by directing it to the administrators, Harrington did not attempt to prevent the Charging Party from gaining access to the information, and the Charging Party had equal access to the information. The Respondent further contends that Harrington had a fiduciary duty under the funds' agreements whereby he could not provide fund information unless such request was authorized by the respective funds. The Respondent therefore concludes that Harrington's response to the Charging Party to contact the funds' administrators was a reasonable alternative means to obtain the information and satisfied its obligation to the employer.

### C. Discussion

This matter presents the question of whether the Respondent must provide pension fund information for the Employer for use during collective-bargaining agreement negotiations when the Employer has equal access to the information. In *Food & Commercial Workers Local 1439 (Layman's Market)*, 268 NLRB 780 (1984), the Board recently evaluated its position regarding the duty of a union to provide trust fund information to an employer when a representative of the union was also a trustee of the fund with access to the requested information. In

<sup>3</sup> There are three health and pension plans involved herein. They are the Retail Clerks Health and Welfare Trust, Retail Clerks Pension Trust, and Washington Meat Industry Pension Trust.

<sup>4</sup> A.W. Rehn and Associates, Inc. is the administrator of the Retail Clerks Health and Welfare Trust. United Administrators, Inc. is the administrator of the Retail Clerks Pension Trust and for the Washington Meat Industry Pension Trust.

that case the Board held that it was not unlawful for a union to refuse to provide the information to the employer when the union did not act to prevent the employer from gaining access and cooperated with the employer by providing the means of obtaining the information; the union did not possess the specific information requested; and the employer had equal access to the information. In so holding, the Board noted that since its decision in *Hospital Employees (Sinai Hospital)*<sup>5</sup> the Supreme Court had held in *NLRB v. Amax Coal Co.*<sup>6</sup> that trustees of jointly administered trust funds are not agents of their respective parties but are fiduciaries "whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed [them]." Therefore the Board concluded in *Layman's* that its holding in *Sinai Hospital* must be limited to situations where the collective-bargaining representative demonstrates that it is in de facto control of a nominally independent trust fund.

We find that the instant case is no different from *Layman's*.<sup>7</sup> Thus we are dealing with the same

union, trust funds, union representative, and a similar information request from the same employer's attorney as in *Layman's*. There is no evidence here that the Respondent attempted to prevent the Charging Party from gaining information or that the Charging Party did not have equal access to the information. Nor does the record demonstrate that the Respondent had the specific information or that the Respondent was in de facto control of the funds. Indeed the record demonstrates that the funds acted independently and without control by the Respondent. Further the Respondent as in *Layman's* cooperated with the Charging Party by giving it the means to contact the funds' administrators to receive the desired information. Consequently we find that our decision in *Layman's* is controlling and accordingly we shall dismiss the complaint in its entirety.

#### CONCLUSIONS OF LAW

The Respondent did not violate Section 8(b)(3) of the Act.

#### ORDER

The complaint is dismissed.

<sup>5</sup> 248 NLRB 631 (1980).

<sup>6</sup> 453 U.S. 322 (1981).

<sup>7</sup> Because of the disposition herein, we do not have to reach the Respondent's apparent defense that the terms of the trust agreements limited its representative's duty under the Act to provide information relevant to bargaining purposes.